



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable W. Eugene Tate
County Attorney
Hamilton County
Hamilton, Texas

Dear Sir:

Opinion No. 0-1508

Re: Commissions cannot be collected under a void delinquent tax contract; and an attempted assignment thereunder is ineffective; and such contract cannot be ratified.

This is in answer to your letter in which you ask whether or not Mr. W. F. Turner is entitled to commissions for collecting delinquent taxes for Hamilton County between February, 1939, and April, 1939.

Under the facts submitted to us, Hamilton County as "First Party" and W. F. Turner and C. O. McMillan as "Second Party" entered into a contract on February 25, 1939, whereby "Second Party" was employed "to enforce by suit or otherwise . . . the collection of all delinquent state and county ad valorem taxes" in Hamilton County, and "Second Party" agreed to "file and institute . . . suit for the collection of said taxes". The said W. F. Turner was not an attorney at law, not having been "admitted and licensed to practice law"; but the said C. O. McMillan was licensed as an attorney at law. The Attorney General of Texas refused to approve said delinquent tax contract, and on June 22, 1939, in Conference Opinion No. 3064 to the Comptroller of Public Accounts he held that said contract was "illegal and void, by virtue of the fact that a contract to do acts constituting the practice of law by a person not licensed to practice law is illegal (Art. 430a, P.C.), and the joinder of a licensed attorney-at-law does not remove the illegality, because if part of the consideration of a contract is illegal the whole contract is void since it cannot be said how much of the obligation is based upon illegal consideration". After said refusal on the part of the Attorney General to approve said contract, said W. F. Turner,

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on April, 1939, executed "what he terms an assignment of all his rights and interest in the contract" to the said C. O. McMillan. The Commissioners' Court of Hamilton County approved this "so-called" assignment, and approved the contract as between Hamilton County and C. O. McMillan. The Attorney General and the Comptroller approved the contract as between Hamilton County and C. O. McMillan alone. Immediately after the first contract was entered into between Hamilton County as "First Party" and said W. F. Turner and C. O. McMillan as "Second Party", but before the Attorney General refused to approve the same, the said W. F. Turner did some work under the contract and collected some taxes. He now insists that he is entitled to compensation for his work, and should be paid the commissions provided for in the contract.

The only authority for counties entering into delinquent tax contracts is found in Articles 7335 and 7335a of Vernon's Annotated Revised Civil Statutes of Texas. Article 7335 reads as follows:

"Whenever the commissioners court of any county after thirty days written notice to the county attorney or district attorney to file delinquent tax suits and his failure to do so, shall deem it necessary or expedient, said court may contract with any competent attorney to enforce or assist in the enforcement of the collection of any delinquent State and county taxes for a per cent on the taxes, penalty and interest actually collected, and said court is further authorized to pay for an abstract of property assessed or unknown and unrendered from the taxes, interest and penalty to be collected on such lands, but all such payment and expenses shall be contingent upon the collection of such taxes, penalty and interest. It shall be the duty of the county attorney, or of the district attorney, where there is no county attorney, to actively assist any person with whom such contract is made, by filing and pushing to a speedy conclusion all suits for collection of delinquent taxes, under any contract made as herein above specified; provided that where any district or county attorney shall fail or refuse to file and prosecute such suits in good faith, he shall not be entitled to any fees therefrom, but such fees shall nevertheless be collected as a part of the costs of suit and applied on the payment of the compensation allowed the attorney prosecuting the suit, and the

attorney with whom such contract has been made is hereby fully empowered and authorized to proceed in such suits without the joinder and assistance of said county or district attorneys."

Article 7335a reads as follows:

"No contract shall be made or entered into by the Commissioners' Court in connection with the collection of delinquent taxes where the compensation under such contract is more than fifteen per cent of the amount collected. Said contract must be approved by both the Comptroller and the Attorney General of the State of Texas, both as to substance and form. Provided however the County or District Attorney shall not receive any compensation for any services he may render in connection with the performance of the contract or the taxes collected thereunder."

We still hold to the opinion that the original delinquent tax contract between Hamilton County as "First Party" and W. F. Turner and C. O. McMillan as "Second Party" was void for the reasons stated in the Attorney General's Conference Opinion No. 3064, dated June 22, 1939. We are enclosing a copy of that opinion.

There is an additional reason why the original delinquent tax contract was void, and that was because it was not approved by the Comptroller and the Attorney General. In the case of Easterwood vs. Henderson County, 62 S.W. (2d) 65, the Commission of Appeals, speaking through Presiding Judge Harvey, said:

"The contract involved in this controversy is clearly one 'in connection with the collection of delinquent taxes', and, since same was not approved by the state comptroller and the Attorney General, it is void. As already pointed out, the authority in the commissioners' court to contract with respect to collection of delinquent taxes proceeds from the Legislature, and is subject to such limitations as the Legislature sees fit to prescribe. Nothing is to be found in the act of 1931, which can be construed as dispensing with the approval of the comptroller and the Attorney General which is made a requirement

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by the other act. On the contrary, the act of 1931 expressly provides that same 'is not intended to change any law now in effect regarding the collection of delinquent taxes.' Section 4 (Vernon's Ann. Civ. St. art. 7264a, Section 4)."

In the case of Sylvan Sanders Company vs. Scurry County, 77 S.W. (2d) 709, the Court of Civil Appeals at Eastland, speaking through Chief Justice Hickman, said:

"The language of the act is clear and unambiguous, and, if a contract is properly designated as one made by the commissioners' court 'in connection with the collection of delinquent taxes,' the same is void unless it has the approval of both the designated state officials."

In view of the fact that the contract of February 25, 1939, to which W. F. Turner was a party, was void, it follows that he cannot recover for anything done under the contract. In the case of Seeligson vs. Lewis & Williams, 65 Tex. 215, 57 Am. Rep. 593, the Supreme Court of Texas, speaking through Associate Justice Stayton, said:

" . . . it is well settled, 'if any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal.' 1. Parsons on Contr., 457. It matters not whether the consideration is illegal because it consists of some act prohibited by statute or because it violates some rule of the common law."

In the case of Guyer vs. Prince, 106 S.W. (2d) 1091, by the Court of Civil Appeals at Amarillo, it was said:

"We . . . are of opinion that the contract of October 14, 1889, was void."

"The contract, according to the undisputed testimony, tended to prevent the administration of justice, was contrary to public policy, unenforceable, and void."

"An unlawful contract cannot form the basis of any enforceable legal or equitable rights, or impose any legal obligations upon the parties to it.

"As a general rule a court will not aid in the enforcement of an illegal contract at the instance of any of the parties thereto where they are in pari delicto, but will leave the parties to the agreement where it finds them. * * *

"Pursuant to the foregoing rule, the courts will not compel specific performance of an illegal contract, nor will it aid a party to recover possession of property to which he is entitled thereunder." 10 Tex. Jur. p. 233, par. 136.

"The appellants were not entitled to recover on the contract disclosed by the testimony, hence, the court correctly directed a verdict against them . . ."

The "so-called" assignment by W. F. Turner conferred no rights on anyone, and had no force or effect. In the case of City of San Antonio vs. Rische (Ct. Civ. App.), 28 S.W. 388 (writ of error denied), it was said:

"The franchise intended being private, and therefore void, an assignment thereof by the grantees would not confer any right in the assignee, for no right had ever passed, and none could be created, by an assignment of an invalid grant."

The same holding has been made in many other cases, including White vs. Downs, 40 Tex. 225; and American Employers Ins. Co. vs. Reddy (Comm. App.) 51 S.W. (2d) 280.

The only way that C. O. McMillan acquired any rights is under the theory that a new contract was entered into in April, 1939, between Hamilton County and C. O. McMillan alone, which contract was approved by the Comptroller and Attorney General; and any rights acquired under or by virtue of the new contract did not begin until the new contract was entered into in April.

The acts of W. F. Turner in making the "so-called" assignment and of Hamilton County, and the Comptroller and

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The Attorney General in approving the new contract in which the State does not amount to a ratification of the original contract made in February, to which W. F. Turner was a party, because the original contract was void and could not be ratified. In 10 Tex. Jur. 260, it is said:

"The effect of illegality of a contract cannot be waived by the parties, and nothing that they may do can give it validity. So an illegal contract cannot be ratified by either party."

It is our opinion that W. F. Turner is not entitled to any commissions for taxes collected during the time and under the circumstances you ask about in your letter.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

Cecil C. Rotsch

Cecil C. Rotsch
Assistant

CR:FG

APPROVED DEC 23, 1939

Gerard B. Mann

ATTORNEY GENERAL OF TEXAS

